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No. 90-549

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity; ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In their petition for a writ of certiorari, petitioners established (i) that the District of Columbia and other circuits have applied a heightened pleading and evidentiary standard to plaintiffs opposing pre-trial dismissal on qualified immunity grounds of motive-based constitutional claims; and (ii) that the court below had declined to apply this test and adhered to traditional summary judgment standards. After the petition was filed, the Court granted certiorari in *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir.), *cert. granted*, 111 S. Ct.

292 (1990) (No. 90-96), a case in which the plaintiff below has challenged the District of Columbia's heightened standard in the context of a defendant's motion to dismiss the complaint.

Faced with the indisputable importance of the issue this petition presents and the Second Circuit's failure to apply the heightened standard adopted by other courts of appeals, respondent now attempts to avoid review by this Court by dismissing *Siegert* as inapposite and mischaracterizing petitioners' position as a mere argument as to the sufficiency of respondent's evidence. In order to refocus the argument on the real issue—what standard plaintiffs must meet when public official defendants move for summary judgment on the basis of their qualified immunity—petitioners respectfully submit this brief in reply to respondent's Brief in Opposition and in further support of their petition for a writ of certiorari.

POINT I

THIS COURT'S DETERMINATION TO GRANT CERTIORARI IN *SIEGERT V. GILLEY* ESTABLISHES THE IMPORTANCE OF THE HEIGHTENED STANDARD ISSUE.

In *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir.), *cert. granted*, 111 S. Ct. 292 (1990) (No. 90-96), the District of Columbia Circuit dismissed a claim premised on unconstitutional motivation pursuant to the heightened standard adopted in *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, *partially vacated en banc and rehearing granted*, 817 F.2d 144, *reinstated en banc and rehearing denied sub nom. Bartlett on behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987),[1] discussed at length in the petition here. After this petition was filed, this Court granted certiorari in *Siegert*. As noted in Stern, Gressman & Shapiro,

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1 *Martin* was applied at the pleading stage in *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 3301 (1990).

Supreme Court Practice (6th ed. 1986) at 221, "[w]here the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari had been granted, the issue is obviously important . . . ."

Respondent seeks to dismiss the significance of the heightened standard issue by suggesting (Brief in Opposition at 5 n.2) that the sole question presented in *Siegert* is whether trial courts must permit some limited discovery before dismissing pursuant to the heightened standard. The *Siegert* petition, however, cannot be read so narrowly. Siegert argues, *inter alia*, that the heightened standard adopted by the D.C. Circuit conflicts with the pleading standard set forth in Rule 8(a)(2) of the Federal Rules of Civil Procedure as well as the qualified immunity doctrine articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); and *Anderson v. Creighton*, 483 U.S. 635 (1987). Petition for Writ of Certiorari in *Siegert v. Gilley* at 18-22. Although the preclusion of discovery as to the issue of motivation is one aspect of the D.C. Circuit's standard, petitioner Siegert has clearly challenged the standard *in toto* and not merely that feature. Moreover, the discovery issue and the appropriateness of the standard itself are inextricably bound. It would be difficult for the Court to pass upon the necessity of permitting discovery as to motive before dismissing under that heightened standard, without simultaneously approving or rejecting that standard itself, either explicitly or implicitly.

Even if the issue in *Siegert* could be narrowed as respondent suggests, granting certiorari here would simply become *more* important. Petitioners have established that the Second Circuit has not adopted the standard embraced by the D.C. Circuit, or the variation on that test adopted by other courts of appeals. Thus, deciding only the discovery issue, while leaving the standard itself unreviewed, would prolong an existing conflict as to the proper application of an important doctrine. As noted recently, "[a] statement by the Court on these issues is necessary . . . to end the confusion among the circuits, and to lead to a more uniform application of the

qualified immunity standard to these [motive-based] types of cases." "Qualified Immunity for Civil Rights Violations: Refining the Standard," 75 Cornell L. Rev. 462, 483 n. 156 (1990).

Granting certiorari here, as well as in *Siegert*, has the advantage of providing the Court the opportunity to address the issue comprehensively. It can consider, in particular, the appropriateness of the test set forth in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), as an alternative to the test already adopted by the D.C. Circuit. Once the Court resolves all the issues in both of these cases, the lower courts will have the clear framework for applying qualified immunity doctrine to motive-based claims that they have lacked to date.

POINT II

THE SECOND CIRCUIT DID NOT APPLY A HEIGHTENED STANDARD HERE.

As noted in the petition, the court of appeals was required to measure the evidence through the "prism" of the appropriate substantive evidentiary burden in reviewing the district court's decision on petitioners' summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The Second Circuit, as demonstrated by its discussion of summary judgment and the authorities upon which it relied, applied the traditional standard rather than the heightened standard other circuits have held is appropriate when qualified immunity as to a motive-based claim is at issue. The court relied solely on the inferences it held could be drawn from respondent's circumstantial evidence concerning the public controversy. This evidence was not sufficient to meet the *Martin* test and would also fail to meet the *Matsushita* standard.

By resort to a lengthy recitation of the circumstantial evidence concerning the controversy allegedly relied upon by the

court (Brief in Opposition at 15-46)[2], respondent seeks to deflect attention from his failure to adduce evidence as to the respective motives of the individual petitioners which would suffice under *Martin* or *Matsushita*—direct evidence of an improper motive or evidence tending to exclude petitioners' explanations for their tenure recommendations or decisions, *e.g.*, evidence showing (i) that petitioners granted tenure at Stony Brook to others with less substantial scholarship or (ii) that petitioners denied tenure to other controversial candidates even when their scholarly accomplishments were markedly superior to candidates awarded tenure. Moreover, respondent declines to address the merits of applying either *Martin* or *Matsushita* here, failing to even cite either case.

Instead, respondent resorts to the argument that the Second Circuit "obviously felt that, whatever the standard was . . . , respondent's proffered evidence was sufficient . . . ." Brief in Opposition at 4-5. This contention, however, is neither supported nor implied by any statement in the Second Circuit's opinion.

Respondent has failed to rebut the central thesis of the petition—that there is a conflict among the circuits as to an important question of law. Because the Second Circuit declined to apply either *Martin* or *Matsushita* and because respondent would have failed to meet either test had the circuit applied it, this case provides an ideal vehicle for determining whether a heightened standard is appropriate, and whether *Matsushita* provides the best formulation for such a standard. Given the importance of the question, the petition should be granted.

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2 The recitation is misleading. Contrary to the impression left by that description, the only items specifically referred to by the Court were Marburger's October 19, 1983 statement, Wharton's January 30, 1987 letter and "the public protests and threats to defund Stony Brook programs." Appendix to Petition at 25a.

CONCLUSION

FOR THE REASONS STATED HEREIN AND IN THE PETITION FOR A WRIT OF CERTIORARI, THE PETITION SHOULD BE GRANTED.

Dated: New York, New York
November 19, 1990

Respectfully submitted,

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